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NO. 90-256

# In the Supreme Court of the United States

OCTOBER TERM, 1990

G. RUSSELL CHAMBERS
Petitioner,

v.

NASCO, INC.
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

## BRIEF OF PETITIONER ON THE MERITS

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## QUESTIONS PRESENTED

Plaintiff was awarded its entire attorney's fees in this diversity case—slightly over $1,000,000. Since the controlling state law provided no basis for the award, and in fact positively would not have allowed it, the award was granted under the "inherent power" of the court pursuant to the "bad faith" exception to the general American rule against fee shifting.

1. What, if any, is the scope of a federal court's "inherent power" to shift the entire burden of attorney's fees? Does it include the ability to shift fees in a diversity case in contravention of the law of the forum state?

2. If so, what are the limitations upon the exercise of this "inherent power?" For example, if the award is authorized as a "sanction," are the general requirements imposed upon an award of "sanctions," such as the prohibition against massive post-judgment retributive sanctions not reasonably tailored to the wrong sought to be redressed, operative? Can the award include reimbursement for expenses incurred before appellate courts and administrative agencies because of conduct not deemed "frivolous" by those higher courts or agencies? Can the award include reimbursement for fees incurred by a party who fails to mitigate his or her expenses? Does the general attorney's fees award requirement of "reasonableness" apply? Additionally, are due process requirements and the prohibition against excessive fines relevant?

## RULE 24.1(b) AND 29.1 STATEMENTS

**The following persons and entities were parties below, but are neither petitioners nor respondents herein:**

1. **Calcasieu Television and Radio, Inc.**
2. **A.J. Gray, III**
3. **Edwin A. McCabe**
4. **Richard A. Curry**
5. **Mabel C. Baker**

**There are no parent or subsidiary companies of petitioner to be listed.**



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MISCELLANEOUS (continued)

MISCELLANEOUS (continued)





IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No.90-256

G. RUSSELL CHAMBERS

v.

NASCO, INC.

## BRIEF OF PETITIONER ON THE MERITS

## OPINIONS BELOW

The Opinion of the United States Fifth Circuit Court of Appeals (Pet. App., 59a-83a) is reported at 894 F.2d 696. The Opinion of the United States District Court for the Western District of Louisiana (Pet. App., 1a-58a) is reported at 124 F.R.D. 120.

## JURISDICTION

The Opinion of the United States Fifth Circuit Court of Appeals was rendered on February 6, 1990. A timely petition for rehearing was denied on May 4, 1990. (Pet. App., 84a-85a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Petition for writ of certiorari was granted on Oct. 1. 1990.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution provides in full as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

. . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

3. Section 1927 of Title 28 of the United States Code (28 U.S.C. § 1927) provides in full as follows:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally such excess costs, expense, and attorneys' fees reasonably incurred because of such conduct.

4. Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

## STATEMENT OF THE CASE

On August 9, 1983, NASCO, INC. ("NASCO") and Calcasieu Television and Radio, Inc. ("CTR") entered into an agreement (the "Purchase Agreement") to buy and sell



some of the assets used in the operation of KPLC-TV, the NBC affiliate in Lake Charles, LA, for $18,000.000. The Purchase Agreement was signed on behalf of CTR by its president, G. Russell Chambers ("Chambers"). (1R22).

Shortly thereafter, when certain information concerning NASCO's plans for the station came to Chambers' attention, he determined that it was not in the public interest to close the sale. He contacted his attorneys of eleven years, the Camp, Carmouche firm of Lake Charles, Louisiana, and advised them of his desire to cancel the sale and avoid transferring the station, that he was willing to pay damages to NASCO if necessary, and asked if anything could be done to effect his wishes. (R51-53)[1]

The matter was assigned by the managing partner, Edwin Hunter, to the chief litigator, A.J. Gray, III, who discovered that the Purchase Agreement had not been recorded in the public records. Gray then devised a plan to transfer the station to a third party to take advantage of Louisiana's Public Records Doctrine, and avoid specific performance should Chambers be sued. This plan was communicated to Chambers with the explanation that it was a viable way to prevent NASCO from acquiring the KPLC assets. (R 57, 152) As proposed, Chambers doubted the viability of the defense because it sounded "as if it was a lawyerly trick that would not likely be sustained." (R 67, 153) Eventually Gray persuaded Chambers, who "decided to take [Gray's] advice, after a fashion." (Gray #4, at 7; R 214). Chambers believed the defense was valid only on the advice of counsel, and he allowed its assertion only to further his purposes of protecting the public interest by avoiding specific performance of the Purchase Agreement, while offering to pay damages. (R 56)

[1] Record cites with no volume number preceding them refer to the transcript of testimony taken before the District Court on April 11, 1988, at the trial of the sanctions phase of this case. Chambers' testimony is included in the Joint Appendix, Volume II, at 93.

It was decided by the Camp, Carmouche lawyers that a trust that Chambers had long considered and had prepared drafts of for the benefit of his children should be created, and that the trust should be the transferee of the KPLC assets. Notice was given to Gray that a lawsuit was to be filed by NASCO on Monday, October 17 1983 to enforce the Purchase Agreement, and that this suit would involve some sort of injunctive relief. Gray believed that if the transfer documents were executed prior to issuance of any restraining order, his Public Records Doctrine Defense would be a *fait accompli.* (22 R 3426-27) Therefore, the transfer documents were drafted the weekend of October 15, 1983. The signature of the trustee, Chambers' sister Mabel Baker, was obtained on October 17, 1983, and the transfer instruments were recorded on Monday, October 17, 1983 at 8:30 a.m. (22 R 3428-29).

NASCO filed a diversity suit on October 17, 1990 against Chambers and Calcasieu Television, Radio and in the United States District Court for the Western District of Louisiana. When the suit, which requested specific performance, punitive damages, and injunctive relief to prevent the encumbrance of KPLC, was filed the trial court contacted Gray to elicit his comments on behalf of Chambers regarding a TRO that the court was prepared to sign freezing the KPLC assets. (22 R 3429). Gray failed to disclose to the court that a transfer of the assets had already been effected, although, after consultation with his law partners, he immediately advised the court of the transfer on the following day. (1 R 136; R 166).

Various injunctions were issued by the trial court to prevent further transfers of encumbrances of the KPLC assets. (2 R 153, 253). When the litigation went into the discovery phase, Chambers was found in contempt of court for acting on the separate advice of two law firms and not giving NASCO physical possession of the general ledger of Calcasieu Television and Radio (even though it had been given full access to view it) rather than merely those portions of the books that pertained to KPLC. (3 R 312; R 74)



Gray continued to prosecute the suit, without any direction from Chambers. (22 R 3156; R 88, 125, 128) Various pre-trial motions were filed, defenses were asserted, and a cross-claim was filed. The thrust of Gray's defense was the assertion of the Public Records Doctrine and allegations that Chambers was excused from performing because of NASCO's prior breach of the Purchase Agreement (a doctrine known as mora creditoris in Louisiana).

Numerous pre-trial conferences were conducted by the trial court in an attempt to shape and narrow the issues of the litigation, and to rule on various discovery motions (*E.g.* 5 R 613; 6 R 863; 8 R 1007). Eventually, the trial court determined to bifurcate the issues presented by the case, and entered an order that NASCO's claim for specific performance would be tried first, and only those defenses applicable thereto would be considered at that time. (9 R 1176)

On the eve of trial, Gray stipulated on behalf of Chambers that the Purchase Agreement was enforceable, that NASCO had not breached it, and that Chambers was in breach of the Agreement. His stated purpose for doing so was to eliminate all issues other than the Public Records Doctrine defense. (43 R 96) Chambers was not informed of the stipulation until a few minutes before it was made, and was not explained its significance or "eventual meaning." (R 96)

The trial court rejected that defense, finding the transfer of the KPLC assets to Baker to be a "simulation," fraudulent, and therefore an absolutely nullity. Chambers and Calcasieu Television, Radio and were ordered to specifically perform the Purchase Agreement. (J.A.6).

On appeal, the United States Court of Appeals for the Fifth Circuit issued a *per curiam* affirming the trial court, and finding that the appeal was frivolous under

Federal Rule of Appellate Procedure 38. The Court fixed damages to be double costs, and the "appellee's attorneys' fees, if reasonable, expended in the prosecution of this appeal." Additionally, the Court of Appeals remanded "for a determination of whether sanctions in the form of costs and attorney's fees should be imposed against the appellants and/or their attorneys under Fed. R. Civ. P. 11 and against counsel for the appellants under 28 U.S.C. § 1927 as it relates to the proceedings in the district court." (J.A. 46-50)

While the litigation was progressing, Chambers had continued to invest in Calcasieu Television, Radio and to the tune of $580,000 in station improvements. (38 R 69) When NASCO claimed entitlement to those improvements, Chambers offered to convey those assets that "replaced" assets that were covered by the Purchase Agreement, but refused to convey upgrades unless fair market value was paid. (38 R 38, 46) NASCO obtained the assistance of the trial court, who, while terming this an "honest" and "good faith" disagreement (34 R 24), nonetheless issued a ruling that Chambers had to convey free of charge all of the improvements claimed by NASCO even though not an object of the Purchase Agreement.

NASCO and CTR then closed the sale of the KPLC-TV assets, and settled a claim by NASCO for delay damages for $850,000. (18 R 2636) NASCO and CTR were prevented from settling a claim for attorneys' fees because the trial court made it known that the matter of sanctions was its exclusive domain, and that it would not approve any such settlement. (23 R 3254)

Sixteen months following the Court of Appeals' remand, NASCO filed a Motion to Fix Compensatory Damages Pursuant to Contempt Judgment, to Fix Appellate Sanctions, and to Impose Sanctions. ( 19 R 2639) NASCO prayed that the court fix the amount of the sanction imposed by the appellate court for the frivolous appeal. Additionally, NASCO went beyond the mandate of the appellate court and prayed that the trial court impose



sanctions "including, but not limited to, all attorney's fees, expenses, and costs incurred by NASCO in these proceedings, and in the administrative proceedings before the F.C.C." Since neither Rule 11 nor 28 U.S.C. § 1927, the two bases for sanctions specified in the remand order by the Fifth Circuit Court of Appeals, were sufficient to authorize the trial court to grant the relief requested by NASCO, NASCO urged the trial court to award it all of its attorneys' fees incurred in the entire proceeding under the "inherent power" of the court. Included as defendants were Chambers' attorneys, (Gray and Edwin A. McCabe), Baker, and her attorney, Richard A. Curry.

Following the hearing, the trial court granted NASCO's motion, and sanctioned all parties named as defendants in NASCO's Motion. (Pet. App. 1a) Baker was reprimanded; Gray was disbarred from the Western District of Louisiana, with no ability to reapply for admission for three years; McCabe was declared ineligible to practice in the Western District for five years; and Curry was suspended from practice in the Western District for six months. (Pet. App., 54a, 55a, 56a). Judgment was entered against Chambers personally in the sums of $66,286.65, representing the amount of the sanctions imposed by order of the United States Court of Appeals for the Fifth Circuit, and $996,644.65, representing the total attorney's fees and expenses incurred and paid by NASCO, Inc. in this matter. (Pet. App., 52a). Finding Rule 11 and 28 U.S.C. § 1927 inappropriate for its purposes, the trial court relied exclusively upon its "inherent power" in imposing these sanctions, including the award of attorneys' fees. (Pet. App., 42a-47a).

The United States Court of Appeals for the Fifth Circuit affirmed. (Pet. App 59a) The court rejected Chambers' argument that the trial court did not possess the "inherent power" to award attorney's fees because Louisiana law, the controlling law, did not allow such an award. Instead, the court found that federal courts always possess the "inherent power" to shift the full burden of attorneys' fees in order to police against abusive litigation practices. (Pet.

(App., 72a-78a). The court also rejected Chambers' argument that the general rules governing sanctions, such as the requirements of swiftness, mitigation, and reasonable relation to wrong, should apply to the award. Instead, the court found that the existence of "vertical" powers, such as those granted to the courts by Rule 11 or 28 U.S.C. § 1927, does not constrain the courts from exercising "horizontal" powers, such as the "inherent power" to shift attorneys' fees. (Pet. App., 69a-72a).

## SUMMARY OF ARGUMENT

In *Alyeska Pipeline Services v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), this Court held that federal courts do not have inherent power to assess attorneys' fees in contravention to the general American rule against fee shifting. This power is reserved to the legislature. The only permissible deviations from this rule are common law exceptions that have been recognized by the courts for so long without legislative interference as to suggest tacit approval. Among these exceptions is when one party is guilty of vexatious, oppressive, or harassing conduct — "bad faith." But, as this Court was careful to note, this exception, which is a legacy of the common law chancery courts of equity, is not available to a federal court in diversity cases unless the controlling state law recog-nizes the exception. This Court's holding was based upon a correct application of *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and *Hanna v. Plummer,* 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 2d 8 (1965). Since *Alyeska,* a unified chorus of opinions from every circuit court of appeal and a multitude at the district court level have recognized both the "bad faith" exception and its limitation in diversity cases. No court has ever invoked the "bad faith" exception in a diversity case unless the doctrine was a part of the law of the forum state until now.

In this case, the lower courts have sanctioned petitioner $1,000,000 by invoking the "bad faith" exception



in a diversity case where such a fee shift is absolutely contrary to the forum state's law, as expressed in its Civil Code and its jurisprudence. The purported authority for this act was the "inherent power" of a federal court to prevent abuse of its processes, the exercise of which is allegedly immune from the *Erie* concerns.

However, there is no "inherent power" to shift the entire burden of attorneys' fees except the narrow common law exceptions to the general American rule recognized by this Court in *Alyeska.* "Inherent powers" are those that are absolutely essential for a court to function. The "bad faith" exception does not find its roots in strict functional necessity, but rather in the "necessity" of the court to do equity between the parties. Federal courts are armed with a panoply of devices (none of which were used in this case), some expressed in rules and other perhaps inherent, to protect themselves from abuse and to vindicate their authority. Given the existence of these weapons, the power to shift attorneys' fees is not "necessary" as a device to combat abuse, and therefore can not be "inherent." In fact, the existence of express powers to sanction abuse circumscribes any roving "inherent" power to shift fees, at least in cases where the express powers have not even been invoked so that their adequacy could be tested. Simply put, when the express sanctions powers are invoked, and invoked properly, there is no need for any "inherent" power to shift attorneys' fees. A massive post-judgment retributive fee shift under the court's "inherent power" is not a desirable substitute for the proper use of the express sanction powers to correct abuse because the former serves no educational function, it triggers due process concerns, and it does not deter future abuse. It turns the court's power to "sanction" into an instrument of retribution, which does nothing except serve to chill legitimate zealous advocacy.

## ARGUMENT

### A. THE LOWER COURTS' AWARD OF ATTORNEYS' FEES CANNOT BE SUSTAINED ON THE BASIS OF THE "BAD FAITH" EXCEPTION TO THE GENERAL AMERICAN RULE AGAINST FEE SHIFTING.

The general American rule regarding attorneys' fees is that each party shall bear his or her own, a rule which displaces any "roving authority" to assess attorneys' fees "whenever the courts might deem them warranted." *Alyeska Pipeline Service Company v. Wilderness Society, supra*, 421 U.S. at 260, 95 S.Ct. at 1623. The circumstances under which attorney's fees are to be awarded "are matters for Congress to determine." Therefore, the "courts are not free to fashion drastic new rules" with respect to attorney's fees. *Id.*, 421 U.S. at 262, 269, 95 S.Ct. at 1624, 1627.

*Alyeksa* did not announce a new rule. The American Rule was so "well-engrained" by 1796 that in that year this Court "remarked that although the practice might not be strictly correct, it was the general practice of the United States and one that was entitled to the respect of the court, till it is changed, or modified, by statute." Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System* 61 N.C.L.R. 613, 616 (1983), citing *Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306 (1976). The rule against fee shifting was "firmly entrenched" by the time this Court held that a federal statute providing for the assessment of standardized costs was the exclusive vehicle for the recovery at law of attorneys' fees. Note, *Awards of Attorneys' Fees in the Federal Courts*, 56 St. John's L. R. 227, 279 (1982), citing *The Baltimore*, 75 U.S. (8 Wall.,) 377 (1896).

This in not to say that under certain "limited circumstances" federal courts do not possess the "inherent power" to award attorneys' fees absent legislative authority. Fees may be shifted under certain guardedly circum-



scribed judicially recognized common law exceptions to the general American rule, one of which is upon a finding of bad faith, vexatious or oppressive conduct. *Id.*, at 421 U.S. 257-59, 95 S.Ct. at 1621-1623. Indeed, there have been many situations where this Court has recognized the "bad faith" exception, and has granted attorneys' fees in federal question cases. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (civil rights case); *F. D. Rich Company, Inc., v. United States for Use of Indus. Lumber Co., Inc.*, 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974)(Miller Act case); *Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 1263 (1973)(LMRBA Case); *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)(civil rights case); *Fleischmann Distilling Corp. v. Maier Brewing Company*, 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967)(LANHAM Act case);

*Vaughan v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962)(admiralty case).

However, federal courts are not free to apply this common law exception in every case. As this Court noted when it first expounded upon the existence and nature of the "bad faith" exception:

> A very different situation is presented when a federal court sits in a diversity case. "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorneys' fees or giving a right thereto, which reflects a substantial policy of the state, should be followed."

*Alyeska Pipeline Service Company v. Wilderness Society, supra*, 441 U.S. at 259 n.31, 95 S.Ct. at 1622 n.31.

Accordingly, with the sole exception of the case *sub judice,* the federal trial and appellate courts have consistently applied this Court's statement in *Alyeska,* and have held that in a diversity case, attorney's fees cannot be awarded on the basis of the court's inherent power under the "bad faith" exception unless that exception is recognized by the applicable state law. *See First State Underwriters Agency of New England Reinsurance Corp. v. Travelers,* 803 F.2d 1308, 1317 (3rd Cir. 1986), finding that Pennsylvania's "bad faith" exception governed the award of attorney's fees in a diversity contract action; *Nepera Chemical, Inc. v. Sea-Land Service, Inc.,* 794 F.2d 688 (D.C. Cir. 1986) applying District of Columbia law in a diversity action to determine whether attorney's fees could be awarded as punishment for bad faith, vexatious, wanton or oppressive behavior; *Amey, Inc. v. Gulf Abstract & Title, Inc.,* 758 F.2d 1486, 1508 (11th Cir. 1985), *cert. denied,* 476 U.S. 1153, 106 S.Ct. 2267, 90 L.Ed.2d 712 (1986), rejecting a claim for attorneys' fees predicated upon the "bad faith" of the plaintiff in the way it "initiated and conducted" the litigation because the "bad faith exception is not recognized in the Florida jurisprudence;" *Barton v. Drummond Co.,* 636 F.2d 978, 985 (5th Cir. 1981), finding that federal law did not control the issue of whether attorneys' fees were awardable for bad faith conduct in the course of, and prior to, the litigation because the case was a diversity action, but concluding that attorney's fees were authorized by Alabama Law; *Perkins State Bank v. Connolly,* 632 F.2d 1306, 1310, 1312 (5th Cir. 1980), holding that the inherent power of a federal court to shift fees under the "bad faith" exception does not supersede state law in a diversity case, and reversing an award of attorneys' fees made under the "bad faith" exception because it was not authorized by Florida law; *Lewis v. S.L. & E., Inc.,* 629 F.2d 764, 773 n.21



(2d Cir. 1980), reversing an award of attorneys' fees made on the basis of the "bad faith" exception because New York law did not authorize the award; *Montgomery Ward & Company, Inc. v. Pacific Indemnity Company, supra,* holding that attorney's fees could not be awarded under the "bad faith" exception unless that exception was recognized by Pennsylvania law; *Tryforos v. Icarian Development Company, S.A.,* 518 F.2d 1258 (7th Cir. 1975), *cert. denied,* 423 U.S. 1091, 96 S.Ct. 887, 47 L.Ed.2d 103 (1976), noting that the "unquestioned power" of a federal court to award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons could not be exercised by a federal court in a diversity case unless such an exercise is permitted by state law. *See also City of Philadelphia v. Fidelity and Deposit Company of Maryland,* 1987 WL 15432 (E.D. Pa. 1987), recognizing that Pennsylvania, not federal, law controlled on the question of whether attorney's fees could be awarded under the "bad faith" exception; *Miller v. Cudahy Company,* 656 F.Supp. 316, 336 (D.C. Kan. 1987), *aff'd in part,* 858 F.2d 1449 (10th Cir. 1988), recognizing that state law controlled the awardability of attorneys' fees in diversity cases under the "bad faith" exception, but noting that Kansas had no rule of law on the subject; *Watson v. Ferguson,* 1986 WL 5202 (N.D. Ill. 1986), applying Illinois' statutory version of the "bad faith" exception because "a federal court sitting in diversity should apply state statutes" regarding attorneys' fees; *William Shapiro v. American Home Assurance Company,* 1985 WL 3033 (E.D. Pa. 1985), examining Pennsylvania law for application of the "bad faith" exception because "as this is a diversity case, any award of attorney's fees must have a basis in the law of the relevant state;" *Brady v. Hartford Fire Insurance Company,* 610 F.Supp. 735 (D.C. Md. 1985), applying Maryland's version of the "bad faith" exception in a diversity case; *Friends of All Children, Inc. v. Lockheed Aircraft Corporation,* 587 F.Supp. 180, 188 (D.C.D.C. 1984), *aff'd,* 746 F.2d 816 (D.C. Cir. 1984), refusing to award attorneys' fees under the "bad faith" excep-

tion because "jurisdiction in these cases is by diversity, . . . and the law of the District of Columbia does not now appear to permit an award of attorneys' fees even under the extreme circumstances alleged here;" *P. Liedtka Trucking, Inc. v. James H. Hartman and Son, Inc.* 537 F. Supp. 381, 382 n.1 (E.D. Pa. 1982). *aff'd*, 709 F.2d 1491 (3rd Cir. 1983), applying the statutory version of the "bad faith" exception contained within Pennsylvania law because "where state law provides such a right, attorneys' fees may be assessed by a federal court in a diversity case;" *Chicago Regional Fort District v. Ferroslag, Inc.*, 531 F.Supp. 401, 401-02 (N.D. Ill. 1982), holding that the court was not "free to exercise its 'inherent power' to tax a party with fees on the basis" of the bad faith exception because "Illinois not federal law provides the rule of decision;" *Bass v. Spitz*, 522 F.Supp. 1343, 1358 n.28 (E.D. Mich. 1981), rejecting a claim for attorneys' fees for defense of a state law diversity claim made under the "state law counterpart of the 'bad faith' exception" because the court found "no Michigan statute or court rule which would authorize recovery of attorney's fees on this basis;" *McKinney v. Gannet Co., Inc.*, 660 F. Supp. 984, 1025 (D.C.N.M. 1981), *appeal dismissed*, 694 F.2d 1240 (10th Cir. 1982), refusing to award attorney's fees under the "bad faith" exception because it "has not been adopted in New Mexico."

In the instant case, there was no room for a finding, as was made in some of the cases cited above, that the "bad faith" exception was recognized and applied by the law of the forum state. The Court of Appeals correctly noted that Louisiana does not recognize the "bad faith" exception and steadfastly will not allow fee shifting in the absence of statute or contract, even through use of the "inherent power" of the court. (App., 67a). *See also Marvirazon Compania Naviera, S.A. v. H. J. Baker & Brothers, Inc.* 674 F.2d 364, 368 (5th Cir. 1982); *Quealy v. Paine, Webber, Jackson & Curtis, Inc.*, 475 So.2d 756, 763 (La. 1985). Louisiana does not award attorneys' fees for "bad faith" breach of contract. *See Ogea v. Loffland Brothers Company*, 622



F.2d 186, 190 (5th Cir. 1980); *Rutherford v. Impson*, 366 So.2d 944, 947 (La. App. 1st Cir. 1978), *writ denied*, 369 So.2d 140 (La. 1979). The only measure of damages is "the loss sustained by the obligee and the profit of which he has been deprived." La. Civ. Code art. 1995 (1984). Moreover, the underlying rationale of the "bad faith" exception, which is punishment, *Hall v. Cole, supra*, 412 U.S. at 5, 93 S.Ct. at 1946, is inconsistent with Louisiana's prohibition of punitive damages. *Baggett v. Richardson*, 473 F.2d 863, 865 (5th Cir. 1973).

Given the wealth of authority on point, at every level of the federal judiciary from its very top to the bottom, the decision of the Court of Appeals should have been a preordained *per curiam* reversing the trial court's grant of attorneys' fees under the "inherent power" of the court to shift fees under the "bad faith" exception to the general American rule. Every court that has ever considered the question has held that state law controls, and has either refused to shift fees because state law did not recognize the "bad faith" exception, or has shifted fees upon a finding that state law did recognize the "bad faith" exception. No court has ever shifted fees under the "bad faith" exception after an express finding that this exception was not recognized under the relevant state law.

But, with the comment that this Court "confused" the issue in *Alyeska*, the Court of Appeals, with no authority whatsoever,[2] dispensed with *Alyeska* and its mountainous progeny, upon a rumination that this Court did not

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[2] The Court of Appeals states that federal courts have not been "even in their treatment of the issue."(Pet. App., 73a) The *concurring* opinion by Judge Gibbon in *Montgomery Ward & Co., Inc. v. Pacific Indenmity Co., supra*, and the *magistrate's* opinion in *Republic of Cape Verde v. A & A Partners*, 89 F.R.D. 14 (S.D.N.Y. 1980), the only two cases cited by the Court of Appeals in support of its holding, hardly supply succor for this statement. Moreover both of these views are pure *dictum* because both Judge Gibbons and the magistrate preceded their ruminations with a finding that state law authorized an award of attorneys' fees.

"intend" what it plainly said. (Pet. App., 67a-68a) But, the "plain meaning" of *Alyeska* is that state law governs attorney's fee awards in diversity actions, even in cases of bad faith litigation. *Montgomery Ward & Co., Inc. v. Pacific Indemnity Co., supra* 557 F.2d at 56. See *also* Mallor, *supra*, at 631 n.127 (In diversity cases, a federal court is to follow the state rule with regard to attorneys' fees for bad faith litigation). While "stare decisis does not mandate that earlier decisions be enshrined forever, of course, it does counsel that [the Court] use caution in rejecting established laws." *Walker v. Armco Steel Corporation*, 446 U.S. 740, 749, 100 S.Ct. 1978, 1984, 64 L.Ed.2d 659 (1980). The lower courts' complete disregard for *Alyeska* and its progeny hardly meets the "heavy burden" of supporting a reconsideration of an established line of jurisprudence, *id.*, as will be demonstrated below.

## B. THE LOWER COURTS' AWARD OF ATTORNEYS' FEES CANNOT BE SUSTAINED ON THE BASIS OF THE "INHERENT POWER" OF THE COURT

Finding no solace for its decision in the "bad faith" exception to the General American Rule regarding attorney's fees, the lower courts turned to the "inherent power" of the courts and "sanctioned" Chambers by shifting the entire burden of attorneys' fees. Without citation of authority, the Court of Appeals espoused the view, "nigh unchallenged in the history of the country, that federal courts have inherent power to police themselves by civil contempt, imposition of fines, the awarding of costs, and the shifting of fees." (Pet. App. 68a). It was this power that was invoked by the lower court to shift the entire burden of attorneys' fees in this case. The Court of Appeal held that the use of this power was not limited by *Erie* because the shifting of fees under the inherent power of the court was "not a matter of substantive remedy, but of vindicating judicial authority." (Pet. App. 77a)



### 1. THERE IS NO "INHERENT POWER" TO SHIFT THE ENTIRE BURDEN OF ATTORNEY'S FEES OTHER THAN THE INHERENT *EQUITABLE* POWER RECOGNIZED IN *ALYESKA*.

It is beyond peradventure that federal courts possess certain "inherent powers." These are the powers that "are necessary to the exercise of all others," *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 764, 100 S.Ct. at 2463, that is, those "necessary to permit the courts to function." *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 819, 107 S.Ct. 2124, 2144, 95 L.Ed.2d 740 (1987) (Scalia, J., concurring), *citing United States v. Hudson*, 7 Cranch 32, 3 L.Ed. 259 (1812). These powers include the contempt power, *Cooke v. United States*, 267 U.S. 517, 539, 45 S.Ct. 390, 395, 69 L.Ed. 767 (1925), and the power to dismiss a claim *sua sponte* for lack of prosecution, *Link v. Wabash Railroad Company*, 370 U.S. 626, 632, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962).

The "inherent powers" belong to three tiers: (1) irreducible inherent power that derives from Article III of the Constitution; (2) absolutely essential powers that arise from the nature of the court; and (3) powers that are necessary only in the sense of being useful. Powers of the first tier are available to the courts even in the face of contrary legislative direction. The second tier represents powers which can be legislatively regulated, but not abridged or abrogated. To the third tier belong powers which can be exercised only in the absence of contrary legislative direction — they exist at legislative whim. This last category is composed of powers that are necessary, but "necessary" only "in the practical sense of being useful." *See Eash v. Riggins Trucking Company*, 757 F.2d 557, 562-63 (3rd Cir. 1985) (en banc).

While this Court has not formally classified the "inherent powers," it has nonetheless made it clear

that the power to shift attorney's fees is of the third tier. In *Alyeska Pipeline Company v. Wilderness Society, supra,* this Court expressly recognized that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." 421 U.S. at 262, 95 S.Ct. at 1624. The "inherent power" to shift fees, such as under the "bad faith" exception, only exists "unless forbidden by Congress." 421 U.S. at 359, 95 S.Ct. 1622. Indeed, integral to the formal recognition given to the "bad faith" exception in *Alyeska* was Congress' long forbearance with regard to the practice, which was viewed as a sign of tacit acceptance and approval. 421 U.S. at 260; 95 S.Ct. at 1623. The "bad faith" exception only exists because Congress is deemed to have acquiesced in its use. Note, *Awarding Attorneys' Fees Against Attorneys,* 60 B.U.L.R. 950, 958 n.2 (1980), *citing Cordeco Development Corporation v. Vasques,* 539 F.2d 256, 263 n. 11 (1st Cir.), *cert. denied,* 429 U.S. 978, 97 S.Ct. 488, 50 L.Ed.2d 586 (1976).

Given that the power to shift fees, even under the "bad faith" exception, is one that can be regulated by Congress, it is not surprising that it finds its source and purpose in something other than its own strict functional "necessity," as was found by the Court of Appeals. (Pet. App., 69a).

> This third category of inherent posers has sometimes been said to be "rooted in the notion that a federal court, sitting in equity possess all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion. . . .[S]uch power is necessary only in the sense of being highly useful in the pursuit of a just result.

*Eash v. Riggins Trucking Company, supra,* 757 F.2d at 563, *citing ITT Community Development Corporation v. Barton,* 569 F.2d 1351, 1359 (5th Cir. 1978). The power can



be traced to 17 Rich. II, c.6, which provided that the Chancellor should award damages (including costs) according to his discretion against persons bringing vexatious and unfounded suits in chancery. This power was thought to be "so far inherent in the equity court as to be inseparable from the exercise of its judicial authority." Therefore, "from the beginning" chancery courts were imbued with the "inherent power" to award fees for suits that were "false, unjust, vexatious, wanton, or oppressive." Battey, *Rule 11 Sanctions: Some Current Observations,* 33 S.D.L.R. 207, 207 & n.2 (1987-88), *citing Guardian Trust Co. v. Kansas City Southern Ry. Co.* 28 F.2d 233, 240-41 (8th Cir. 1921). The federal court's power to award attorney's fees for bad faith conduct "is part of the original authority of the chancellor to do equity in a particular situation. . . ." *Hall v. Cole, supra,* 412 U.S. at 5, 93 S.Ct. at 1946. *See also Alyeska Pipeline Services v. Wilderness Society, supra,* 421 U.S. at 279-80, 95 S.Ct. at 1632-33 (Brennan, J. dissenting), *citing Vaughan v. Atkinson, supra;* Note, *Awards of Attorneys' Fees in the Federal Courts,* 56 St. John's L.R. 277, 279 n.5 (1982). *See generally* Comment, *Attorneys' Fees and the Federal Bad Faith Exception,* 29 Hast. L.J. 319, 321-325 (1977), and Comment, *Attorney Fee Shifting: The Sanctioning Power of Section 1927 of Title 28, United States Code* 9 N. Ill. L.R. 393, 360-400 (1989), for a discussion of the history of the American Rule and the "bad faith" exception thereto.

Apart from the long standing inherent *equitable* power of a court to shift attorneys' fees to compensate a party injured by the vexatious conduct of his adversary, which only exists by virtue of its tacit legislative acceptance, there is no other "inherent power" authorizing a post-trial shift of the entire burden of attorneys' fees, such as some vague inherent power of a court to "police itself from abuse" or to "vindicate its own authority," as was held by the Court of Appeal.[3] That much is clear from this

[3] The question of whether there is an "inherent power" to sanction a

Court's decision in *Roadway Express, Inc. v. Piper, supra.* There, this Court held that attorney's fees could not be assessed against obdurate counsel for discovery abuses under the "excess cost" provision in 28 U.S.C. § 1927. Of more interest, however, was the Court's suggestion that the attorneys' fees could be assessed under the court's "inherent power." However, this "inherent power" was not held to a limitless reservoir of authority to assess attorneys' fees anytime a court feels it necessary to vindicate its own authority or to police itself. Rather, this Court specifically held that, even through courts possess the inherent powers "necessary to the exercise of all others," and to exert the "control necessarily vested in courts to manage their own affairs," such "inherent powers" are nonetheless limited by the general American Rule, and the courts may only shift fees upon a finding of "bad faith" under the exception to the general Rule, "a finding that would have to precede any sanction under the court's inherent power."447 U.S. at 767, 100 S.Ct. at 2465. Properly viewed, then, *Roadway Express* did not announce the existence of a broad bank of "inherent powers" that include the ability to shift attorneys' fees to "vindicate judicial authority." To the contrary, *Roadway Express* was a strong reaffirmation of the viability of the American Rule, and the limit that the Rule imposes upon the "inherent powers" of a court. "To authorize the award of attorneys' fees against plaintiff's lawyers in *Roadway Express,* the Supreme Court relied upon the inherent disciplinary power

Footnote 3 continued

litigant or his or her counsel for specific excesses that may transgress the bounds of acceptable behavior by awarding to his or her opponent the attorneys' fees incurred due to the excess immediately upon discovery of the infraction is not before the Court in this case, and Chambers takes no position on that issue. However, he does suggest that if such "inherent power" exists, there are logical and compelling reasons to limit the power by requiring that it be exercised consistently with the principles that govern the imposition of sanctions under the express sanctioning authority of a court, such as Rule 11. *See* 29-41, *infra.*



of federal courts, which *Alyeska* confined to the traditional exceptions to the American Rule. *Roadway Express'* award of attorneys' fees falls within the bad faith exception." Note, *Awarding Attorneys' Fees Against Attorneys,* 60 B.U.L.R. 950, 958 (1980). *See also* Note, *The Federal Courts' Authority to Assess Attorneys' Fees Directly Against Counsel — Roadway Express v. Piper,* 30 DePaul L.R. 669, 682 (1981), noting that this Court's use of "inherent power" to award attorneys' fees was no more than an application of the "bad faith" exception because it limited "this sanction to *willful* abuses of the judicial process."[4]

Accordingly, courts do not possess inherent power *carte blanche* to shift the entire burden of attorneys' fees as a matter of procedural or judicial efficiency. The general American Rule recognized and applied in *Alyeska* imposes the same limitation on that power as it does upon the power to shift attorneys' fees as a matter of substantive remedy. *Roadway Express* makes that clear. *See also Tiedel v. Northwestern Michigan College,* 865 F.2d 88, 93 (6th Cir. 1988). In either case, such rulemaking is beyond the judicial sphere, and properly belongs to the legislature, as this Court properly recognized in *Alyeska.* It was only the court's inherent *equitable* power to shift attorneys' fees under the "bad faith exception" that authorized the sanction in *Roadway Express.* That equitable power was not available in this diversity case.

4. The "inherent power" invoked in *Roadway Express* under the "bad faith exception" is far short of that wielded in the instant case. Here, Chambers has been assessed every penny of NASCO's attorneys' fees, regardless of its relationship to the alleged offenses. In *Roadway Express,* Justice Blackmun noted in concurrence: "Most significantly, [the Court] does not address the permissibility of applying [the bad faith exception] to award attorney's fees beyond those actually attributable to the culpable attorneys' vexatious actions." 447 U.S. at 769 n. 2, 100 S.Ct. at 2465 n. 2.

## 2. COURTS DO NOT NEED THE INHERENT POWER TO SHIFT THE ENTIRE BURDEN OF ATTORNEY'S FEES IN ORDER TO PROTECT THEMSELVES FROM ABUSE.

There is even less reason at present to recognize the type of "inherent power" weaved by the Court of Appeal from whole cloth than there was at the time *Roadway Express* rejected such a sweeping view and limited the court's "inherent power" to shift fees to the "bad faith exception." Inherent powers are limited to those that are "necessary for the exercise of all others," *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 764, 100 S.Ct. at 2463, or those essential "to permit the courts to function." *Young v. United States ex rel. Vuitton et fils, supra*, 468 U.S. at 819, 107 S.Ct. at 2144. Courts do not need the ability to "sanction" litigants by a massive post-trial shift of the entire burden of attorney's fees. Several express powers have been granted since *Roadway Express* was decided that more than adequately arm the courts.

First, 28 U.S.C. § 1927 has been amended to expressly authorize an award of "attorney's fees reasonably incurred" because of abusive conduct. Imposition of sanctions against counsel under this provision far better equips the court to combat abuse than does a fee shift against his or her client under the court's "inherent power." The assessment of attorneys' fees against counsel provides a court with a "powerful weapon" to discourage dilatory tactics. McIlvine *A District Judge's Views as to the Means of Insuring Compliance by Counsel with Pre-trial Procedures*. 29 F.R.D. 408, 413.
Sanctioning attorney misconduct furthers the deterrence objective "more effectively than an award against a party" because "the attorney, not the party, is in a better position to analyze the merits of a claim and determine whether it has a legal basis." Note, *Awarding Attorneys' Fees Against Attorneys*, 60 B.U.L.R. 950, 959 (1980).[5]

[5] Moreover, courts always possess the inherent authority to discipline



Second, "[s]anctions came into their own in the 1983 amendments to the Federal Rules of Civil Procedure. Explicit authority to impose money sanctions, against lawyers as well as their clients, was written into rules 11, 16, and 26, and sanctions were made mandatory for violating rule 11 and 26." Nelkin, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 Geo. L.J. 1313, 1313 (1986). These amendments "set the framework for a comprehensive system of sanctions to reach a wide array of litigation misconduct." Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 Conn. L.R. 7, 21 (1987). The court's arsenal has been filled with a panoply of sanctions which may be levied for oppressive conduct short of a full shift of the entire burden of attorney's fees. *See* FRCP 11, 16(f), 26(g), 30(g), 37(d), 37(g), 56(g). In particular, the amended Rule 11 is "the judiciary's most powerful weapon in the war against unnecessary and frivolous trial practice." Bloomstein, *Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure*, 21 Akron L.R. 289, 243 (1988). "If the amended procedural standards are diligently enforced as part of a comprehensive system of sanction authority, substantial changes in the ethic of zealous advocacy can be expected." Maute, *supra*, at 23. This comprehensive system is better protection for the court from abuse of its processes than a post-trial massive fee shift under the court's "inherent power" because "the key to avoiding abuse of the litigation process is early and effective judicial management." Schwarzer, *Sanctions Under the New Federal Rule 11 — a Closer Look*, 104 F.R.D. 181, 204. The amendments, when used in conjunction with each other, "provide an adequate set of tools for the early disposition of frivolous claims and defenses." Schwarzer, *Rule 11*

*(footnote 5 continued)*
*attorneys by suspension or disbarment because of their status as officers of the court. In re Snyder*, 472 U.S. 634, 105 S. Ct. 2874, 86 L.Ed.2d 504, 512 (1985).

*Revisited*, 101 Harv. L.R. 1013, 1019 (1988).

The sanction scheme effected by the above discussed amendments adequately equips the courts with all that is necessary to police themselves against abuse.[6] In fact, it was the specific purpose of the authors of the scheme to "expand" the existing "equitable doctrine" employed in *Roadway Express* by eliminating the subjective "bad faith" requirement. *See* Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 Hof. L.R. 997, 1001 (1983). Given the comprehensiveness of the scheme, the express powers granted to the courts should be viewed not only as a displacement of the vague and nebulous "inherent powers" that might have previously existed, but also as a circumscription of those powers. *See, e.g., Society Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207, 78 S.Ct. 1087, 1093, 2 L.Ed.2d 1255 (1958), where this Court noted that "whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37" and that "[r]eliance upon . . . 'inherent power' can only obscure analysis of the problem." As one court observed:

> [Fee shifting] absent legislative action first to declare that the trial court has inherent power to impose such sanctions [is] a giant step in expanding the power of the court with sweeping ramifications. Such power in the trial court, unfettered and unbridled, without appropriate safegards and guidelines, could cancel out any benefits derived through the judicial process by generating a proliferation of appeals. We are therefore of the view that any power of the trial court to impose such sanctions should be created by the legislative branch of government with appropriate safeguards and guidelines developed following a thorough in depth investigation.

*Young v. Redmond*, 128 Cal. Rptr 86, 93-94 (Cal. App. 1976). *See also* Cogan *The Inherent Power and Due Process Models in Conflict* 42 § W.L.J. 1011, 1020 (1989), criticizing the Fifth Circuit's overuse of "inherent power" for sanctioning litigants, and noting that, "Legislatures should participate in deciding the general rules that govern the kind of sanctions imposed and the methods by which they are imposed upon litigants. . . . . Proper reliance upon the express sanction powers will lead to a more "balanced approach" to the "litigation problems [they] address" and "will avoid excesses that would indeed pose the risk of negative side effects." Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 Cath. U.L.R. 587, 588-89 (1987). Courts should be confined to the express powers when adequate in order to promote uniformity, and because such express powers provide guidance to both the bench and bar. *See* Comment, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 Cardozo L.R. 1779 (1988).

6. Even in circumstances not covered by these express provisions, the courts are not defenseless. They certainly possess the inherent power to levy non-monetary sanctions, such as contempt and the dismissal of frivolous claims or defenses. *Cooke v. United States, supra; Link v. Wabash Railroad Co., supra.* Moveover, they may possess the inherent power to levy monetary sanctions when that sanction is "tied to specific costs that [bear] a direct relationship to the alleged misconduct and thus [offers] a nexus and a limit." *Eash v. Riggins Trucking, Inc.*, 757 F.2d at 565. The "sanction" levied in the instant case was not so limited.



### 3. USE OF INHERENT POWER TO SHIFT THE ENTIRE BURDEN OF ATTORNEYS' FEES, EVEN IF ON PROCEDURAL GROUNDS, IS LIMITED IN DIVERSITY ACTIONS BY *ERIE* AND ITS PROGENY.

In the case below, the trial court could not have found the need to impose the sanction of attorneys' fees in order to vindicate its judicial authority. At the time the award at issue was finally made, fifteen months after a

final decision on the merits, the court did not need vindication — its work was done, and it had not found the need to sanction anyone while that work was being accomplished, except for contempt citation. The record shows that the trial court was very well aware of its power to impose sanctions, and it found that use of this power was unnecessary. Warnings and the shaping of issues had been sufficient to police itself against abuse and vindicate its authority. It was only the mention by the Court of Appeals in its remand order of the possibility of sanctionable conduct that spurred the trial court to decide that sanctions were indeed in order. Then, it dredged up six years of conduct long under the bridge, and punished Chambers for all of it. Given the course of this proceeding, it is difficult to understand the Court of Appeals' attempt to justify the award of attorney's fees made by the trial court under the "inherent power" of the court to "control its courtroom." (Pet. App. 77a). Having foregone use of the panoply of sanctions available to it to stop the abuses that it perceived were occurring during the course of the litigation, it is less than clear how the trial court's imposition of the $1,000,000 "sanction" of NASCO's full breadth of attorney's fees was a matter of the strict "functional necessity" that the Court of Appeals found is at the heart of a court's "inherent powers."(Pet. App. 69a).

The assertion that the lower court "needed" the power to levy the massive post-judgment "sanction" imposed in this case does nothing but prove that the real object of its scorn was not abuse of the procedural processes, but rather the pre-trial conduct of Chambers in refusing to perform the Purchase Agreement without a valid defense and his role in the creation of the Public Records Doctrine defense.[7] Procedural abuses could have been remedied by a

7. There is not one shred of evidence in the record of this case that Chambers made any decision other than to breach the Purchase Agreement, offer to pay damages, and accept this attorney's advice to attempt the Public Records Doctrine Defense. In fact, the only evidence in the record on the point is that Chambers left all decisions regarding



swift invocation of the numerous sanction provisions contained in the Federal Rules of Civil Procedure, particularly Rule 11. Yet, according to NASCO, the "malefaction" for which Chambers is being punished was beyond the reach of the Rule because it "did not involve the signing of papers filed in conjunction with this litigation." Brief in Opposition to Petition for Certiorari, at 6 n.3. What *procedural* abuses could have occurred that did not involve the signing of papers? The massive post-judgment award that included reimbursement of every penny of attorney's fees incurred by NASCO cannot by any stretch be viewed as "necessary" unless its real purpose was to compensate NASCO and punish Chambers for bad faith breach of contact and his participation in the creation of the Public Records Doctrine defense, acts which both predated the filing of this suit.[8] Contrary to the Court of Appeal's suggestion that the award made in this case was not a matter of "substantive remedy," but rather an instrument of judical vindication, "[a]n award of attorney's fees for bad faith that constitutes a part of the underlying cause of action represents a compensatory award, rather than a punitive award to deter frivolous litigation." Note, *Awarding Attorney's Fees Against Attorneys* 60 B.U.L.R. 950, 959 n. 87 (1980). *See also Marek v. Chesny,* 473 U.S. 1, 35, 105 S.Ct. 3012, 3030, 87 L.Ed.2d (1985)(Brennan, J., dissenting)("The right to attorneys' fees is 'substantive' under any reasonable definition of that term.") Unquestionably, such a compensatory award would trigger *Erie* concerns, especially given Louisiana's abhorrence for punitive

(footnote 7 continued)
the procedure of the litigation up to his lawyers. This is the substance of Chambers' uncontradicted testimony presented at the sanctions hearing. (J.A. 93)

8. Chambers' desire to litigate about his obligation to specifically perform the Purchase Agreement, while constantly offering to pay damages, can hardly be bootstrapped into an abuse of the court's processes. "Clearly, the exercise of one's legal rights to have a dispute resolved in Federal Court is not an abuse of the judicial process." *Indianapolis Colts v. Mayor and City Council,* 775 F.2d 177, 182 (7th Cir. 1985).

damages.[9]

Even if there is a procedural component to the attorney's fee award made in this case, the specter of *Erie* still looms large. A cursory review of the district court's opinion will reveal that in its view there was an inextricable interconnection between the "bad faith" that led to this lawsuit and the "bad faith" that occurred in the manner in which it was conducted. The district court's repeated frame of reference is the "very first act of conspiracy"—the "initial fraud" of the Public Records Doctrine defense. (Pet. App. 9a, 23a, 51a). This is not surprising since NASCO itself asserted in its Motion for Sanctions that, "[t]he indelible taint of the initial fraud pervades these proceedings, thus rendering sanctionable every step taken thereafter by respondents, even if some of those steps, standing alone, may appear legitimate." (R2644). The significant (if not exclusive) role that the "bad faith" breach of the contract and the Public Records Doctrine defense plays in the sanction at issue is more than sufficient to trigger the Rules of Decision Act's mandate that state law control. 28 U.S.C. § 1652.[10]

> The same considerations which formed the foundation of *Hanna* and the line of cases following *Erie* would apply, of necessity, were a federal court to engraft federal notions of attorneys' fees awards onto state substantive rights tried in a diversity action. It is apparent that permitting an award of attorneys' fees in a federal court but denying them for an identical action brought in a state court would represent a significant reason to choose a federal forum. Even if we assume that this difference could be restricted to cases involving obdurate conduct or bad faith, it is clear that the possibility of such an award in many cases would color the substantive aspects of the case and could significantly alter the legal theories presented by the parties as a claim or defense. Under *Erie* and *Hanna*, such a federal shaping of the state substantive right is unwarranted.

*Ward & Company v. Pacific Indemnity Co., supra*, 557 F.2d at 58 n.9 (3rd Cir. 1977), *citing Hanna v. Plummer*, 380 U.S. 460, 471-72, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965).[11] Thus, the Court of Appeal erred when it tossed *Erie* aside on the mere finding thet the *purpose* of the sanction at isue was to 'vindicate judicial authority" rather than to grant a "substantive remedy." This conclusion is flawed both factually and legally.

4. **RELIANCE UPON "INHERENT POWER" TO SANCTION LITIGANTS BY A POST-TRIAL SHIFT OF THE ENTIRE BURDEN OF ATTORNEY'S FEES IS NOT ONLY UNNECESSARY, BUT ALSO COUNTERPRODUCTIVE.**

The award made in this case is at cross purposes with the proper exercise of a court's inherent power to manage its own docket, promote efficiency, and deter abuses of process. The massive post-judgment, untailored and unfocus-

9. NASCO received all that Louisiana law allows — specific performance and damages for the delay.

10. This is not a case where the issue is whether a state rule should be applied in lieu of a Federal Rule of Civil Procedure, which would be governed by the Rules Enabling Act. 28 U.S.C. 2072. Thus, the *Sibbach v. Wilson Co.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed.2d 479 (1941), and *Burlington Northern R.R. v. Woods*, 480 U.S. 1, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987), rule that federal iaw controls any issue that even remotely might be considered procedural has no application.



11. The mere fact that there may be procedural aspects to the sanction does not insulate it from *Erie's* concern. Even state rules of "form and mode" must be applied by federal courts in diversity actions, "where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply the local rule." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525. 536-37, 87 S.C.t. 893, 900, 2 L.Ed.2d 953 (1958).

ed aspects of the award made in this case render it both inappropriate and dangerous as a "sanction" imposed under the "inherent powers" of a court.

A distinction is to be drawn between the imposition of a "sanction" that requires a party to reimburse those attorney's fees attributable to some conduct below an appropriate standard, and the shifting of the entire burden of attorney's fees for the purpose of making the injured party whole. Sanction rules, such as Rule 11, "are not fee shifting statutes." *Cooter & Gell v. Hartmarx Corporation*, _U.S._, 110 S.Ct. 2447, 2462, 58 USLW 4763 (1990). Their purpose is "not reimbursement, but sanction." *Pavelic & LeFlore v. Marvel Entertainment Group*, _U.S._, 110 S.Ct. 456, 459, 58 USLW 4038 (1989). The line between the two may not always be clear. *See Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2d Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987)("There is no clear line between attorney's fees as damages and attorney's fees as sanctions.") Nonetheless, there are characteristics that distinguish a "sanction" from a shift of attorney's fees.[12]

A primary distinction is a question of timing:

> It is a precept that sanctions must be imposed within a time frame that has a nexus to the behavior sought to be deterred.... Sanctions should not amount to an 'accumulation of all perceived misconduct, from filing through trial,' resulting in 'single post-judgment retribution in the form of a massive sanctions award.' The most obvious defect in this procedure is that it flies in the face of the primary purpose of sanctions, which is to deter subsequent abuses. This policy is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end.

[12] While many of the observations that follow were made with regard to sanctions under Federal Rule of Civil Procedure 11, there is no reason why their compelling logic is not applicable to any sanction of attorney's fees imposed for the purpose of vindicating judicial authority or policing against litigation abuses. *See, e.g., Smith International, Inc. v. Texas Commerce Bank*, 844 F.2d 1193 (5th Cir. 1988), adopting the Rule 11 limitations for sanctions imposed under the authority of 28 U.S.C. §1927 for "bad faith" conduct by attorneys.



*Thomas v. Captial Security Services, Inc.*, 836 F.2d 866, 881 (5th Cir. 1988) (en banc), *citing In re Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986), *cert. denied*, _U.S._, 108 S.Ct. 450, 98 L.Ed.2d 390 (1987). "Early notice can deter continuing violations, thereby saving monetary and judicial resources." *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987).

> A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant santions. Such prompt action helps enhance the credibility of the rule, and, by deterring further abuse, achieve its therapeutic purpose.

*In re Yagman, supra*, 796 F.2d at 1183. *See also* Maute, *Sporting Theory of Justice: Taming Adversary Zeal with Logical Sanctions Doctrine*, 20 Conn. L.R. 7, 21-22, 61 (1987).

An unusually large post-judgment "sanction" is a sure sign of the failure of the sanctioning process to achieve deterrence, and of monetary and judicial waste. "If enforcement of the rule occurs expeditiously before much damage is done, . . monetary sanctions will ordinarily be modest." Schwarzer, *supra*, 104 F.R.D. at 203. But, when "abuses are allowed to pass unchecked, and, thus, undeterred," attorney's fees begin to accumulate. As a consequence, the court is "left faced with an unusually large sanctions amount that will, contrary to the policy, impart absolutely no deterrent value." The efficiency achieved by waiting to assess "sanctions" at the conclusion of the litigation is "paid for in wasted judicial resources and money." *In re*

Yagman, supra, 796 F.2d at 1183.

The second precept of sanctions is that, in order to achieve their educational and rehabilitative purpose, sanctions should be "tailored to the particular wrong." *Thomas v. Captial Security Services Inc., supra,* 836 F.2d at 877. Attorney's fees, when awarded as a sanction, "ordinarily will not include compensation for the entire case." *Mary Ann Pensiero, Inc. v. Lingle,* 847 F.2d 90, 99 (3rd Cir. 1988). The fees awarded must have been "reasonably incurred as a result of the violation." *Willy v. Coastal Corp.,* 855 F.2d 1160 (5th Cir. 1988). "It is crucial that a sanctions award be quantifiable with some precision and properly itemized in terms of the perceived misconduct and the sanctioning authority." *Brown v. Federation of State Medical Boards,* 830 F.2d 1429, 1438 (7th Cir. 1987); *In re Yagman, supra,* 796 F.2d at 1184. *See* Maute, *supra,* at 62.

The requirement that sanctions be limited to those necessary to redress the wrongful conduct is natural for those imposed under the "inherent powers" of the court because the "traditional equitable authority" of the federal court extends "no farther than required by the nature and extent" of the violation that prompts its exercise. *General Building Contractors Association, Inc. v. Pennsylvania,* 458 U.S. 375, 398, 102 S.Ct. 3141, 3154, 73 L.Ed.2d 835 (1982), *citing Milliken v. Bradley,* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). It would also seem to be a natural corollary to the principle that, because "inherent powers" are "shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper, supra,* 447 U.S. at 764, 100 S.Ct. at 2463, *citing Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 450-451, 31 S.Ct. 492, 501-502, 55 L.Ed. 797 (1911). *See also* 6 Moore, Taggart, and Wicker, *Moore's Federal Practice* §54.78 [3] 54-508 (2d ed. 1988), noting that courts possess the "inherent power" to award attorney's fees "made necessary by the unjustified conduct."

Three policies are fostered by requiring that sanc-



tions be tailored to the wrong: (1) the educational purpose of the sanction is enhanced by letting judges pinpoint the abusive acts; (2) the deterrent effect is increased by making the imposition of the penalty for each infraction more certain; and (3) the possibility of abuse is reduced by eliminating the likelihood that a party will run up unreasonable costs and then petition for their reimbursement at the conclusion of the litigation. *St. Amant v. Bernard,* 859 F.2d 379, 382 n.12 (5th Cir. 1988).[13]

There is an additional reason why sanctions should be carefully tailored to the offense. While this Court has held that punitive damage awards are not subject to the Eighth Amendment's prohibition against "excessive fines," in so doing it noted that the Excessive Fines Clause does prohibit the imposition of "excessive monetary sanctions." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* __U.S.__, 109 S.Ct. 2909, 2920, 106 L.Ed.2d 219 (1989). In addition, this Court expressly left open the possibility that the Due Process Clause of the Fourteenth Amendment may place an outer limit on the size of a punitive damage award. *Id.* at 2921, *citing Bankers Life and Casualty Company v. Crenshaw,* 486 U.S. 71, 86, 108 S.Ct. 1645, 1654, 100 L.Ed.2d 62 (1988) (O'Connor, J., concurring). In the context of sanctions, it has been noted that, to avoid the possibility that the sanction will in effect constitute a criminal fine, requiring extensive due process safeguards, the sanction should be limited to "consequential expenses and attorney's fees., i.e., those incur-

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13. Several courts have held that even under the "bad faith" exception, which is a fee shifting rule, fees that have no relation to the complained of conduct should be excluded from the award. *Marshall v. Perez Arzuaga,* 828 F.2d 845, 852-53 (1st Cir. 1987), *cert denied,* 484 U.S. 1065, 108 S.Ct. 1027, 98 L.Ed.2d 991 (1987); *Sierra Club v. U.S. Army Corps of Engineers,* 776 F.2d 383 (2d Cir. 1985), *cert. denied,* 475 U.S. 1084, 106 S.Ct. 1464 (1986); *Lipsig v. National Student Marketing Corporation,* 663 F.2d 178, 181 n.21 (D.C. Cir. 1980); *Richardson v. Commercial Workers of America,* 530 F.2d 126, 133 (8th Cir. 1976), *cert. denied,* 429 U.S. 824, 97 S.Ct. 77 (1976); *Grunin v. International House of Pancakes,* 513 F.2d 114, 127-29 (8th Cir. 1975), *cert. denied,* 423 U.S. 864, 96 S. Ct. 124 (1975).

red 'because' of the paper filed in violation." Schwarzer, *supra*, 104 F.R.D. at 2-2-203. *See also Donaldson v. Clark, supra*, 819 F.2d at 1559 n.10, 1561 ("It may be that the monetary sanction being considered in a specific case is so severe in amount or so arguably unrelated to the misconduct that due process will require extensive due process safegards as prerequisites to its imposition. . . . The more serious the possible sanction both in absolute size and in relation to actual expenditures, the more process that will be due."); *In re Yagman, supra*, 796 F.2d at 1880 ("If the amount of the sanction imposed is grossly disproportionate to the attorney's misconduct, or otherwise falls outside the bounds of the authority for the sanction, then the court should be cognizant of the possibility of a latent fine."). *See also Ray A. Scharer and Company, Inc., v. Plabell Rubber Products, Inc.*, 858 F.2d 317, 321 (6th Cir. 1988).

The third precept of sanctions is the "mitigation principle," limiting recovery to "those expenses and fees that were reasonably necessary to resist the offending paper." Schwarzer, *supra*, 104 F.R.D. at 198. *See also Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1092 (3rd Cir. 1988); *Dubisky v. Owens*, 849 F.2d 1034, 1037 (7th Cir. 1988); *Thomas v. Capital Security Services, Inc. supra*, 836 F.2d at 880; *Brown v. Federation of State Medical Boards, supra*, 830 F.2d at 1439; *In re Yagman, supra*, 796 F.2d at 1184. Mitigation is required to further the deterrent effect of the sanction. The sanction's purpose "would be frustrated if it encouraged the offended party to play the very game at which it is aimed." Schwarzer, *supra*, 104 F.R.D. at 201.

Fourth, a true sanction should not be imposed by a court for conduct that does not occur before that court. For example, a trial court should not impose sanctions for a frivolous appeal or writs. *Sierra Club v. U.S. Army Corps of Engineers, supra*, 776 F.2d at 392; *Roth v. Pritikin*, 787 F.2d 54, 58-59 (2d Cir. 1986). "A rule permitting a district court to sanction an attorney for appealing an adverse ruling might deter even a courageous lawyer from seeking the



reversal of a district court decision." *Emergency Beacon Corporation v. Montmartco, Inc.*, 790 F.2d 285 (2d Cir. 1986). This Court has recently recognized that, at least as far as sanctions are concerned, Federal Rule of Appellate Procedure 38 places "a natural limit on Rule 11's scope" because "the knowledge that, after an unsuccessful appeal of a Rule 11 sanction, the district court that originally imposed the sanction would also decide whether the appellant should pay his opponent's attorney's fee would be likely to chill all but the bravest litigants from taking an appeal." *Cooter & Gell v. Hartmarx Corporation, supra*, 110 S.Ct. at 2462. At least one court has applied the same principle to attorney's fees awards made under the "bad faith" exception. *See Morris by Rector v. Peterson*, 871 F.2d 948 (10th Cir. 1989).

Finally, sanctions are personal. *Hall v. Cole, supra*, 412 U.S. at 5, 93 S.Ct. at 1946; *Robinson v. Ritchie*, 646 F.2d 147, 148 n. 3 (4th Cir. 1981); *Browning Debenture Holders Committee v. DASA Corporation*, 520 F.2d 1080, 1089 (2d Cir. 1977). Obviously, sanctions should only be imposed on those persons or entities guilty of wrongdoing, or the deterrence value will be lost entirely and the sanction will constitute nothing but an unjust punishment that will chill innocent activity. *C.f. Pavelic & Le Flore v. Marvel Entertainment Group, supra*, 110 S.Ct. at 460.In most cases, the lawyer will be the correct party to respond. "Since attorney's are more knowledgeable about the law and in control of most of the procedural steps taken," the current trend is to "impose penalties only upon the offending lawyer.' Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L.R. 613, 649 (1983); *Eash v. Riggins Trucking Co.,Inc. supra*, 757 F.2d at 564 n. 10. *See also* American Judicature Society, *Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* 30-31 (Burbank, Reporter 1989) (assuming that "if sanctions are imposed, they will be imposed on the lawyer.... Clients who are not lawyers are not bound by the rules of professional ethics."); *Slane v. Rio Grande Water Conservation Dist.*, 115 F.R.D. 61, 63 (D.

Colo. 1987)(refusing to "hold laymen responsibile for fees, when it is apparent that competent counsel would have advised them that their claims are without merit."). In fact, it has been held that a lesser standard of behavior is expected of clients than of their attorneys for the purpose of Rule 11. *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1474 (2d Cir. 1988), *rev'd in part on other grounds, sub nom. Pavelic & LeFlore v. Marvel Entertainment Group, supra*, 110 St. Ct. 456.[14]

The attorney's fees award approved by the Court of Appeals cannot by any stretch be viewed as an exercise of the court's "inherent power" to sanction litigants who abuse its processes because the award does not possess any of the characteristics of a sanction. To begin with, the award was made over sixteen months following the final determination of the merits of the litigation. No "sanctions" of attorney's fees were imposed during the entire six year course of the case, while all of the perceived wrongs of discovery abuses, frivolous pleadings, unjustified requests for delay, etc. were occurring. Instead of exercising the powers that could hold this conduct in check, the trial court merely gave warnings that sanctions were available. But, a distinction is to be drawn between "the general notice about sanctions and notice that santions are being considered." *Tom Growney Equipment, Inc. v. Shelly Irrigation Development, Inc.*, 834 F.2d 833, 836 n.5 (9th Cir. 1987). The continued issuance of "warnings" without the actual imposition of sanctions could only have a salutary effect, leading the parties to believe that their conduct had not transgressed the permissible bounds. "Misconduct, once tolerated, will breed more misconduct." Schwarzer, *supra*, 104 F.R.D. at 205. Accordingly, the timing of the attorney's fee award prevented it from having any deterrent effect in this case. The sanctions award which was not requested or granted until long after the conclusion of this

[14] At present, this issue is pending before this Court in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, Docket No. 89-1500, and is scheduled for oral argument on November 26, 1990.



litigation, is far "more retaliatory than substantive in nature." *Stevens v. Lawyers Mutual Liberty Insurance Company*, 789 F.2d 1056, 1061 (4th Cir. 1986).

Nor is the attorney's fee award closely tailored to the perceived wrong. The "sanction" levied in this case contemplates reimbursement of every penny of fees incurred by NASCO from the drafting of the complaint forward, including, incredibly, the closing costs incurred by NASCO — costs that the Purchase Agreement explicitly allocated to NASCO — and the costs incurred by NASCO in prosecuting its claim for delay damages, which it eventually settled! These two activities alone amounted to $185,966.39 of NASCO's total attorney's fees (R.2885), and cannot by any conceivable notion be considered a result of Chamber's bad faith *litigation* conduct. Moreover, the award includes every penny expended by NASCO answering every pleading filed by CTR, even though the trial court explicitly found that "there was some legal basis for some of the defenses" asserted. (Pet. App., 33a) Such "round figuring" upon a mere finding that substantially all of NASCO's fees were attributable to CTR's wrongful conduct is "unsound" as a sanction because it does not allow for a comparison of the sanctions imposed and the perceived wrongful conduct. *In re Yagman, supra*, 796 F.2d at 1165.

The attorney's fees could not have been tailored in this case. The proof of attorney's fees consisted of nothing more than invoices that reflected a whole month's worth of work at one time, with a single narrative describing the entire office effort. No breakdown was made of the time expended on any particular task, the cost or fee associated with that task, or even the person performing that task.[15] There was simply no way for the trial court to determine whether the fees incurred by NASCO were "reasonable," and has been required by the landmark case of *Johnson v.*

[15] Samples of these invoices are included in the Joint Appendix at 133-39.

Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), expressly adopted by this court in *Hensley v. Exkerhart,* 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983), or whether they were attributable to any wrongdoing. *See also Coleman-Worthington Productions v. Schuller,* 914 F.2d 1496 (9th Cir. 1990), and *Sidag Aktiengesellschaft v. Smoked Foods Products Company, Inc.,* 854 F.2d 799, 801 (5th Cir. 1988), both holding that attorney's fees award under the "inherent power" of the court are not immune from the general guidelines that apply to any award of attorney's fees.

No deduction was made in the attorney's fee award for NASCO's failure to mitigate its expenses. NASCO litigated for six years and did absolutely nothing to obtain a summary disposition of this case in the face of a single defense that the Court of Appeals found so frivolous as to merit a *per curiam* affirmance issued from the bench at oral argument and the immediate imposition of sanctions. Instead of hurrying this case along, NASCO filed endless motions and memoranda. "Clearly frivolous litigation may be rebutted quite simply without a flurry of documents." *Brown v. Federation of State Medical Boards, supra,* 830 F.2d at 1439. "If a baseless claim could have been readily disposed of by summary procedures, there is little justification for a claim for attorney's fees and expenses engendered in lengthy and elaborate proceedings in opposition." Schwarzer, *supra,* 104 F.R.D. at 201.

The sheer size of the award made in this case, coupled with its failure to bear any relation to the amount of attorney's fees incurred by NASCO attributable to the wrongful conduct, raises Eighth and Fourteenth Amendment concerns. "The extraordinarily large assessment of expenses in this case appears to be unreasonable on its face." *Batson v. Neal Spelce Associates, Inc.,* 765 F.2d 511, 516 (5th Cir. 1985). *See also In Re: Yagman, supra* ("$250,000 is a remarkably large monetary sanction—large enough to raise immediate suspicion.")



Nor does the sanction imposed by the trial court confine itself to conduct occurring before the trial court. The fine includes amounts incurred by NASCO before the Court of Appeals on writs and in prior appeals, before this Court on a request for stay, and before the Federal Communications Commission during administrative proceedings involving transfer of KPLC's license, which were never condemned by these tribunas, but all of which the trial court deemed to be frivolous and subject to sanction months and years later.

Finally, the sanction is not "personalized." Chambers is exclusively assessed for the entire $1,000,000, even though it is inconceivable that he personally was responsible for NASCO's expenditure of that sum (unless of course the sanction is viewed as punishment for his breach of contract). As explained above, he did not make any of the decisions regarding the method by which his defense would be conducted. The district court found that Gray and McCabe were at least equally as culpable. Its disbarrment of Gray and five year suspension of McCabe instead of calling upon them to share the monetary burden is not equitable apportionment—it is overkill of the rankest kind. Perhaps it found it difficult to apportion the monetary burden, given that it was making a single post-trial massive award instead of sanctioning a specific piece of conduct. But, that fact only further counsels against the use of a post-trial fee shift under the court's "inherent power" as a device to sanction precedural abuses. *See* Mallor, *Punitive Attorney's Fees for Abuses of the Judicial System,* 61 N.C.L.R. 613, 649 (1983)("A more difficult issue facing the courts after *Roadway* is how the sanction of attorneys' fees awarded to an opponent should be allocated between the offending attorney and client.").

There is a fine line that must be carefully tread when sanctions are imposed:

> If sanctions have the capacity to modify conduct in a way that improves the litigation process,

> they could also have the capacity to modify conduct in other ways as well; they might deter conduct that we do not want deterred because it is considered socially desirable. Specifically, there is at least the risk that the threat of sanctions might deter a zealous advocate from litigation designed to attack or dilute a precedent that he or she believes should be overruled. Classic examples of such precedents abound and chilling the zeal of those who would achieve change through litigation would be counterproductive. Moreover, the more severe the sanction imposed, the greater the risk of a chilling effect. Simply put, there is a possibility, if not a probability, that misapplied sanctions would have undesirable side effects.

Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions,* 36 Cath. U.L.R. 587, 593 (1987).

All told, the lower courts have more than crossed the line. The fee shift awarded in this case is the antithesis of a proper exercise of the court's power to prevent abuse of its process. Yet, the Court of Appeals has found a reservoir of "inherent power" to impose the award, even though it is contrary to the substantive law that controls this case and serves no valid procedural purpose. This sets a dangerous precedent.

> Fairnness to litigants who suffer from abuse, and others in the case load queue, depends in large part upon reducing the reluctance of lawyers to seek and judges to impose sanctions in proper circumstances. At the same time, we embrace the fact that zealous advocacy is the attorney's ideal. Hard-fought, energetic and honest representation is at the bedrock of our judicial process. None of the various rules and statutes that authorize sanctions are intended, nor should they be implemented, "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."
>
> The line between these equally important concerns is necessarily vague. Each case must be taken individually and evaluated in light of its own peculiar circumstances. If sanctions are warranted by those circumstances, the court must be meticulously aware that this precarious balance can only be maintained if the sanctions are justly imposed. This means foremost that the conduct in question must in fact be sanctionable under the authority relied upon. It also means that the amount of the sanctions and the manner in which they are imposed cannot be inconsistent with the purpose and directive of the authority on which the sanctions are based. [Sanctions] that do not fall within these guidelines . . . pose a direct threat to the balance between sanctioning improper behavior and chilling vigorous advocacy.



*In re Yagman, supra,* 796 F.2d at 1182-83.

There is no "inherent power" to shift the burden of attorney's fees, and to do away with the general American Rule, on "procedural grounds." Such a power is not "necessary for the exercise of all other powers." *Roadway Express, Inc. v. Piper, supra,* 447 U.S. at 764, 100 S.Ct. at 2463. An attorney's fee award that does not reflect the careful tailoring that marks a "sanction" is, by its nature, an award of damages, implicating substantive law. It has no value as a sanction. As a device to "vindicate judicial authority," it is purely retributive. And,

> to allow punishment to take the form of such a generic, all-encompassing, massive, post-trial retribution, with no indication whatsoever of its reasonableness, would send shivers through the bar.

*In re Yagman, supra,* 796 F.2d at 1185.

## CONCLUSION

The award of attorneys' fees made in this case should be reversed. It is not authorized by statute. Nor is it authorized by the "bad faith exception" to the general American Rule against fee shifting, which is not available in this diversity case. There is no other "inherent power" which allows the award. Those responsible for any procedural abuses in this case have already been punished by sanctions far more stinging than mere money. As to Chambers, he cannot be sanctioned for his "bad faith" breach of contract without violating the strictures of *Erie* and its progeny. Any attempt to sanction him at this late date (on remand for example) for procedural abuses would be completely contrary to the safeguards that prevent sanctions from becoming nothing more than instruments of retribution with a severe chilling effect. Moreover, the record in this case will simply not allow the kind of careful tailoring that any attempt to levy true sanctions would require. The proof submitted by NASCO of its attorneys' fees does not contain any of the detail that would be an absolute essential for such a task on that the law requires for awards of attorneys' fees. This is not by accident. Prior to the sanctions hearing, counsel for Chambers wrote to NASCO and expressly asked for such detail so that a determination of "reasonableness" could be made. (J.A. 130) NASCO not only refused to supply that information, but offered as its justification the fact that, "[b]ecause of the record retention policies of the various firms, such information is not readily available, and would be exceedingly burdensome, if not flatly impossible, to reconstruct." (J.A. 132) There is no justification for allowing NASCO to have a second opportunity to make its case for sanctions by introducing the evidence that it flatly refused to offer before on the ground of impossiblility. Accordingly, this case should not be remanded. The decision below assessing



NASCO's attorneys' fees against Chambers should be reversed and rendered.

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